

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TESLA, INC.

And

MICHAEL SANCHEZ, JONATHAN GALESCU,
and RICHARD ORTIZ and INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE and
AGRICULTURAL IMPLEMENT WORKERS
of AMERICA, AFL-CIO

Case Nos. 32-CA-197020
32-CA-197058
32-CA-197091
32-CA-197197
32-CA-200530
32-CA-208614
32-CA-210879
32-CA-220777

**AMICUS BRIEF OF UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA**

I. INTRODUCTION

A majority of the National Labor Relations Board (“Board” or “NLRB”) issued a “Notice and Invitation to File Briefs” (“Notice”) on February 12, 2021, in the above-captioned cases.¹ In a decision dated September 27, 2019, the Administrative Law Judge [“ALJ”] in the underlying litigation found “...inter alia, that the Respondent [Tesla, Inc., herein “Tesla” or “Respondent”] violated Section 8(a)(1) [of the National Labor Relations Act (the “Act”), 29 U.S.C. §158 (a)(1)] by maintaining and enforcing its team-wear policy.” (370 NLRB No. 88, at p.1 (February 12, 2021).) According to the ALJ, “Respondent argues that the Board’s analysis of workplace rules in *Boeing* [365 NLRB No. 154 (2017)] applies to the team wear rule, but I disagree.” (Italics in original.) (370 NLRB No. 88, slip op. at 45.) The ALJ explained that, “(i)n the absence of special circumstances, the Board has held that employees, particularly during an organizing campaign,

¹ The majority consisted of Board members Kaplan, Emanuel, and Ring. Chairman McFerran dissented, stating, “(c)ontrary to my colleagues, I see no need for the Board to revisit our decision in *Stabilus, Inc.*, 335 NLRB 836, 838 (2010), addressing the lawfulness of employer restrictions on the wearing of union insignia in the workplace.” 370 NLRB No. 88, at p.1, fn. #1. The UBC agrees.

have a Section 7 right to wear insignia at work referring to unions or other matters pertaining to working conditions for the purposes of mutual aid or protection”, citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); other citations omitted. (*Id.*, slip op. at 44.)

Respondent filed exceptions to the decision, including to the finding that the team-wear policy violated the Act, with the Board. In response, the NLRB announced that,

(t)o aid in the consideration of this issue, the Board now invites the filing of briefs in order to afford the parties and interested amici the opportunity to address the following questions.

1. Does *Stabilus* specify the correct standard to apply when an employer maintains and consistently enforces a nondiscriminatory uniform policy that implicitly allows employees to wear union insignia (buttons, pins, stickers, etc.) on their uniforms?
2. If *Stabilus* does not specify the correct standard to apply in those circumstances, what standard should the Board apply?²

The Board majority appears to be considering reversing long-established precedent and adopting a lesser standard than that articulated in *Stabilus*.

In reply to the invitation, the United Brotherhood of Carpenters and Joiners of America (“UBC”) timely files this amicus brief. UBC believes it is very important for the Board to consider the unique perspective offered on this issue by workers and labor unions involved daily in the construction industry. There being no justification otherwise, for the reasons provided, the UBC answers “Yes” to Question #1, *supra*, (thereby negating a response to Question #2) and

² In *Stabilus, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)*, 355 NLRB 836, 837 (2010), the Board explained that, “(i)n agreement with the [administrative law] judge, but for different reasons, we find that the Respondent also violated Section 8(a)(1) by prohibiting employees from wearing pro[-]union T-shirts during the election. We need not reach the judge’s conclusion that the Respondent failed to make the required showing that special circumstances justified the application of its uniform policy under the facts of this case because we find that, even if the Respondent had made the required showing, its actions here would have violated the Act for two independent reasons.” The Board continued, “(a)s the Supreme Court has held, employees have a Section 7 right to wear union insignia on their employer’s premises, which may not be infringed, absent a showing of ‘special circumstances’”, citing *Republic Aviation Corp.*, *supra*, at 801-803.

urges the NLRB to maintain established Board law, i.e. continue to apply *Republic Aviation Corp.* as relied upon in *Stabilus*, and affirm the decision finding a violation.

II. STATEMENT OF INTEREST

The UBC is one of the largest labor organizations in North America. As such, the UBC and its affiliated local unions and councils represent hundreds of thousands of workers in collective bargaining in the District of Columbia, every state in the United States, and every province in Canada. Signatory contractors have employees engaged in all aspects and specialties of the UBC's jurisdiction in the construction industry including, but not limited to, drywall installation, piledriving, dock building, floorcovering, and concrete form work. The UBC and its members have a compelling interest in this issue and argue that there is more than a sufficient basis for the Board to uphold the ALJ's decision and, just as important, no justification to change the current law.

III. FACTUAL BACKGROUND

The facts of the case are fully described in the ALJ's decision. However, some pertinent facts are worth repeating here. The ALJ explained that, "(i)n the fall of 2016, the International Union, United Automobile, Aerospace and Agricultural Workers of America, AFL-CIO (Union or UAW) began an organizing campaign at Tesla, Inc." (370 NLRB No. 88, slip op. at 1.) Tesla, "(d)uring the relevant time period ... maintained 'General Assembly Expectations'" ("GAE"), which "contains a section concerning 'team wear'." (*Id.*, slip op. at 40.) Tesla provided to General Assembly ("GA") employees "team wear compliant clothing when hired but prior to August [2017], employees would often wear shirts in a variety of colors with pictures or emblems such as sports teams and clothing brands to work in GA without any supervisor informing them to wear only Tesla assigned team wear." (*Id.*, slip op. at 40.)

However, “(b)eginning in the spring of 2017 until August, production associates in GA began wearing UAW shirts which had been passed out by employees.... Employees also wore union stickers and hats to work.” (*Id.*, slip op. at 40.)

The ALJ’s legal analysis of this violation began with the well-supported declaration that, “(i)n the absence of special circumstances, the Board has held that employees, particularly during an organizing campaign, have a Section 7 right to wear insignia at work referring to unions or other matters pertaining to working conditions for the purpose of mutual aid or protection”, citing *Republic Aviation Corp. supra*, and other cases, citations omitted. (*Id.*, slip op. at 44.) The ALJ noted, “(h)owever, an employer may prohibit the wearing of union insignia by employees if the employer proves special circumstances.” (Citations omitted.) (*Id.*, slip op. at 44.) According to the ALJ, “any rule that limits employees’ Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances to justify the rule.” (Citation omitted.) (*Id.*, slip op. at 44-45.) Tesla “argue[d] that the Board’s analysis of workplace rules in *Boeing* applies to the team wear rule” but the ALJ disagreed and instead “applied the principles set forth in *Republic Aviation v. NLRB*, *supra*, and its progeny.”³ (*Id.*, slip op. at 45.)⁴

³ See, *Boeing Co.*, 365 NLRB No. 154 (2017).

⁴ According to the Board, the ALJ “found that the Respondent’s team-wear policy unlawfully prohibits GA production associates from wearing union shirts, because the Respondent failed to establish that the team-wear policy is justified by ‘special circumstances’ under *Republic Aviation Corp. v NLRB*, 324 U.S. 793 (1945). In excepting to this finding, the Respondent argues, among other things, that its team-wear policy does not interfere with GA production associates’ Section 7 right to display union insignia and that the *Republic Aviation* ‘special circumstances’ analysis is not applicable here because its GA production associates have freely and openly worn union stickers and hats and are merely prohibited from substituting union shirts for the required team wear. However, in *Stabilus, Inc.*, 355 NLRB 836, 838 (2010), the Board stated that ‘(a)n employer cannot avoid the “special circumstances” test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia.’” 370 NLRB No. 88, at p.1 (February 12, 2021).)

IV. ARGUMENT

This Board majority has been overturning long-established NLRB precedent at an alarming rate without justification. A paper issued by a leading think tank stated in part, that,

(t)he Trump board has repeatedly reversed long-standing board precedent, weakening workers' rights and giving more power to employers. [Citation omitted.] In the two years that Republicans have held the majority on the board, they have overturned NLRB precedent in more than a dozen cases. All of those decisions overturning precedent favor employers. None favors workers or unions.⁵

The Board must not continue in this harmful direction.

There can be no serious debate to the contrary that unionized workers enjoy better wages, benefits, and working conditions than do non-unionized workers.⁶ Furthermore, it is more likely than not that workers who wear stickers, decals, etc. on their clothing and equipment on jobsites are most prevalent in the construction industry. Union construction workers have a fierce pride not only in the work they do, but in what they and their collective bargaining representatives have been able to achieve for them in a dangerous industry. This pride, solidarity, mutual respect, and camaraderie are evidenced by the stickers included and referenced herein.

Earning a living in the construction industry is not easy: it is dangerous, physically demanding work.⁷ Carpenters, millwrights, and others represented by the UBC and its affiliates, are highly skilled tradesmen and tradeswomen. They have completed rigorous training to obtain

⁵ See, *Unprecedented[:]* *The Trump NLRB's Attack on Worker's Rights*, Celine McNicholas, Margaret Pydock, Lynn Rhinehart, Economic Policy Institute (October 16, 2019), at p. 6.

⁶ See, Bureau of Labor Statistics, U.S. Dep't of Labor, Press Release, *Union Members-2020*, Table 4, (July 22, 2021) (construction union members earned a median weekly wage of \$1,257 while non-union construction employees only earned \$868), available at <https://www.bls.gov/news.release/pdf/union2.pdf> (last viewed March 15, 2021).

⁷ “*Build a Better South[:]* *Construction Working Conditions in the Southern U.S.*”, A Collaboration by The Workers Defense Project, Partnership for Working Families, & The University of Chicago, Dr. Nik Theodore, Bethany Boggess, Jackie Cornejo, and Emily Timm, at p. 4: “Construction workers face some of the most dangerous working conditions in the U.S. [footnote omitted] ...construction workers have a much higher risk [of] being injured or killed on the job than workers in most other industries.” (Footnote omitted.)

and update the skills they need to be competitive in the workplace. Obtaining and exercising those skills is a point of pride, and demonstrated by the stickers, etc. that they proudly display.⁸

Stickers also, for example: indicate if workers have certain specific training,⁹ serve an important safety function,¹⁰ remind workers to promote safety on the job¹¹ and remind them of their fallen colleagues¹², identify which worker is a jobsite steward to whom to report safety and other concerns¹³, display solidarity and camaraderie amongst members.¹⁴

But don't take our word for it; review the comments of union members themselves in their own words as to why they display union stickers on hardhats, etc., and why it is so important and necessary for them to do so.¹⁵ For example:

“Pile Drivers and Divers are a highly specialized and skilled craft within the UBC. I am proud to display the Local 2404 sticker logo on my hardhat.”-Darrell Hawk, 40-year member of Local Union 2404, British Columbia, Canada.

⁸ **Exhibit #1** is a sticker from the North Central States Regional Council of Carpenters, with jurisdiction in Minnesota, North Dakota, South Dakota, Iowa, Nebraska, and Wisconsin, indicating the benefits of skilled, well-trained labor compared to labor that is not.

⁹ **Exhibit #2** is a sticker from the Michigan Regional Council of Carpenters indicating that the union member has taken “ICRA” or “Infection Control Risk Assessment” training; **Exhibit #3** is another sticker from the Michigan Regional Council of Carpenters indicating that the union member has taken COVID safety training.

¹⁰ **Exhibit #4** is a sticker from the Michigan Regional Council of Carpenters with the number to call in an emergency on a particular project.

¹¹ **Exhibits #5-A and 5-B** are stickers from the Chicago Regional Council of Carpenters promoting worker and jobsite safety.

¹² **Exhibit #6**, is a powerful and eloquent letter, written in an inimitable blue-collar voice, from Local Union 1985 member Colin Schellenberg explaining why he wears a hardhat sticker.

¹³ **Exhibit #7**, shows a sticker indicating a jobsite steward, from Local Union 1325, Alberta, Canada.

¹⁴ **Exhibit #8** is a sticker from the North Central States Regional Council of Carpenters representing solidarity and support amongst union members.

¹⁵ Due to the space limitations imposed by the Board, only a select few of the dozens of comments and/or stickers, decals, etc. received in support of this brief can be referenced herein. See also, **Exhibit #9**, the Statement of Richard Williamson, Local Union 1045, Michigan Regional Council of Carpenters; **Exhibit #10**, the Statement of Shawn Baumgart, Local Union 687, Michigan Regional Council of Carpenters; **Exhibit #11**, the Statement from the Millwright Regional Council of Ontario, and various members of Local Unions affiliated with that council.

Brian Ewing, Carpenters Local Union 106, Altoona, Iowa: “Hard hat stickers represent the pride I feel when I walk onto a job site with my fellow brothers and sisters. It is a show of solidarity and unity, and is a visual symbol for the skill and professionalism we bring to our trade.”

Ryan Ponthan, Local Union 68, Saint Paul, Minnesota: “Hard hat stickers can communicate a higher level of experience and professionalism. When you see someone with a lot of hard hat stickers, it is likely they are well-trained and a skilled worker. Stickers can also communicate safety, both industry-wide or with job-site specific training.”

“My name is Charles Bullock and I’ve been a union carpenter for 16 years in Local 926. Union stickers are more than just decoration. They are a badge of honor and a source of pride. My union stickers prove that I graduated from the best of the best carpentry school. They prove at first glance that I am the best at what I do, that the job I’m working on has best safety practices, and that I am being paid a living wage, and health benefits. Union carpenters have worked hard for the strides we’ve taken to better the working class. It is only right that we be able to showcase how it was all possible – through the union.”- Charles Bullock, Local Union 926, New York City.

“My name is Alexandra Guadalupe, Local 212, and I've been a union carpenter since 2007. My union stickers identify the pride I have being a union member. My union stickers also show the diversity in members and solidarity as members wear them proudly. I feel empowered knowing the story behind the sticker, which many of my union brothers and sisters fought [for] before me. Union stickers represent fair wages, healthcare, and workplace safety for the working class. Union Stickers are an advertisement of pride being a union member. I will show off my union sticker with pride.” Alexandra Guadalupe, Local Union 212, New York City.

“Aside from the obvious pride in our unions, hard hat stickers which identify a local union, are a beacon to other members to know who to ask for help should a craft related question arise. Likewise, if there is a question of personal safety, knowing who is a member of one’s local union gives a person someone to reach out to who, in theory, can be trusted. We wear our union’s stickers proudly and in solidarity. They indicate that we have received the best training in the industry from the UBC, and sometimes indicate in what discipline of our trade we are most qualified. For example, I would not expect to see a piledriver hardhat sticker on a millwright job. And, if I did, I would expect that the piledriver would receive extra attention regarding safety issues and quality needs particular to millwright work. Simpl[y] put, our union stickers are a badge of honor, a point of pride, and a way to share information at a glance.”- Dawn Steinwright, Central Puget Sound Carpenters Local Union 30, Renton, Washington.

“The men and women of the Carpenter's Union wear hardhat stickers for a variety of reasons; we have stickers that show we've been safety trained for specific job sites, we have stickers that show solidarity for different political ideas (such as racial equality or anti-right to work), we have other Carpenter's Local's stickers to show respect, solidarity,

and camaraderie, we have stickers showing important information like contract negotiations, and, most importantly, we have stickers from our own Local Union. Stickers allow us the freedom of expression guaranteed by the constitution, but they are also an important tool for showing that we are part of a team; that we not only work together, but have each other's backs, and that we can rely on one another. Cumulatively, the stickers on your hat show your history, your personality, and your community.”-Liam Ward, Local Union 1243, Fairbanks, Alaska

As can be seen by the wide geographical range represented in just these examples, these and similar stickers are worn by union construction workers on jobsites throughout North America.

Moreover, women are a growing segment of the construction industry workforce. The UBC is in the forefront of recruiting and training women to work in the carpentry trades. Stickers promoting respect, solidarity and recognition of this vital segment of the industry is demonstrated in **Exhibits #12** (the statement of Amanda Leggett, Local Union 1985, Saskatchewan, Canada), **#13** (hardhat sticker, “Sisters in the Brotherhood”, from the St. Louis-Kansas City Carpenters Regional Council), and **#14** (hardhat sticker, “Sisters in the Brotherhood”, from the Pacific Northwest Regional Council of Carpenters, with jurisdiction in Washington, Oregon, Montana, Idaho, Wyoming, and Alaska).

Additionally, the stickers have a direct connection with organizing and recruitment. Construction job sites are very different from the traditional industrial setting. Because of construction management displacing general contracting, the number of subcontractors on construction sites or the absence of subcontractor clauses in some collective-bargaining agreements, it is not unusual for union-represented construction employees to be on job sites with unrepresented employees, even in the same trade, working for a different employer. Also, given craft jurisdictions, there can even be unrepresented and represented employees working for the same employer. Union stickers signal to unrepresented employees the positive value of being represented and working under a collective-bargaining agreement. This leads to

conversations between workers, organizing opportunities of employers, and recruitment of employees into union membership or switching to work for a unionized construction employer, and other activity protected under the Act.

Abandoning the special circumstances test, and leaving it to employers to dictate, under a lesser standard, what, if any, sticker, etc. an employee may or may not wear on their hardhat or other work gear would be misguided and harmful. Doing so will negatively affect safety and other considerations on a jobsite. The standard for an employer to demonstrate special circumstances in order to restrict, narrowly, such insignia is the correct and proper standard and should be maintained. The widespread and necessary use of stickers, etc. by construction workers is an important and well-established practice, and must not be infringed by a change in Board law.

V. CONCLUSION

In sum, the Board must not replace the “special circumstances” test with a less stringent standard. As the UBC has clearly established, the right to wear stickers, etc. on the jobsite is not only a fundamental, long-established right under Section 7 of the Act, but doing so serves many critical functions for workers in the construction industry. It is very important that the Board considers the views of these employees and understands and appreciates the real world job site conditions they describe, and the consequences of any adverse Board ruling.

Accordingly, the “special circumstances” analysis established by the Supreme Court in *Republic Aviation* in 1945 and followed repeatedly by the Board since then, including in *Stabilus*, must be maintained. The UBC strongly urges the Board to affirm the ALJ’s decision in the above-captioned case and maintain *Stabilus* in that regard.

Dated: March 22, 2021, Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the Brief of Amicus United Brotherhood of Carpenters and Joiners of America was filed with the National Labor Relations Board at www.nlrb.gov and served on the following parties and others via email on March 22, 2021. The exhibits to the Brief of Amicus United Brotherhood of Carpenters and Joiners of America was filed with the National Labor Relations Board at www.nlrb.gov and served on the following parties and others via email on March 21, 2021

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